

Is Fortnite stealing black dance culture? The creator of the ‘Milly Rock’ argues yes in a new lawsuit.

By Meagan Flynn

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In the summer of 2015, rapper 2 Milly went “Milly Rocking” on every block in Brooklyn, turning the hip-hop two-step into the viral dance of the summer. People started doing the “Milly Rock” on fire escapes, on top of cars, in the end zone after scoring touchdowns. Rihanna was doing it. Travis Scott did it. “If you ain’t Milly Rockin’, you ain’t doing nothing,” 2 Milly, whose real name is Terrence Ferguson, told Vice in 2015.

But then one day last July, some unwanted “Milly Rockers” were brought to the rapper’s attention: Fortnite avatars.

“Everybody was like, ‘Yo, your dance is in the game,’ ” 2 Milly told CBS News last month.

The moves appeared unmistakable, 2 Milly said. The dancing avatar swung her left arm, then her right, spun her fists in a circular motion, then twisted her hips and did it all again. In Fortnite, the massively popular battle-royal video game, the “dance emote” was not called the “Milly Rock.” Instead, the move was called “Swipe It,” a victory dance that players could unlock after purchasing an add-on package for 950 “V-bucks,” or about \$9.50. Players recognized the dance immediately — just as they had so many other popular viral dances that appear to be included in Fortnite but were made famous by mostly black artists.

Now, 2 Milly is suing over it.

The lawsuit, filed Wednesday in federal court in Los Angeles, accuses Epic Games, the maker of Fortnite, not only of stealing 2 Milly’s dance moves and his likeness without permission but also exploiting various African American artists’ talent without credit. The accusation that Fortnite has been appropriating black music and dance culture for financial gain has been simmering for months, sparking debate over whether Fortnite has unfairly rebranded the popular dances as “#fortnitedances” while the creators don’t share any of the profits.

The lawsuit points to a plethora of examples. Snoop Dogg’s 2004 dance from “Drop It Like It’s Hot” is named “Tidy” in Fortnite, the suit claims. Alfonso Ribeiro’s famous “Carlton Dance” from the “The Fresh Prince of Bel-Air” is named “Fresh.” Marlon Webb’s moves in the viral “Band of the Bold” Jogging Man Challenge video are named the “Best Mates” emote, the suit claims, while Donald Faison’s signature dance on the TV show “Scrubs” is simply called “Dance Moves.”

“There seems to be this disrespect and undervalue, or lack of appreciation, for African American talent,” David L. Hecht, one of 2 Milly’s lawyers, told The Washington Post. “They’re taking advantage of the fame of these artists without any type of acknowledgment.”

A spokesman for Epic Games did not immediately return a request for comment late Wednesday.

The debate over Fortnite’s use of the popular dances accelerated in the days after the “Milly Rock” appeared to be included on Fortnite Battle Royale’s Season 5 Battle Pass in July. The game, which boasts more than 200 million players, \$1 billion in revenue and a reputation for hogging boyfriends’ attention, is free for download. But Fortnite makes its money through in-game purchases and “Battle Passes,” which is how users could unlock the “Swipe It” dance.

Chance the Rapper was among those who said he recognized the “Milly Rock” immediately.

“Fortnite should put the actual rap songs behind the dances that make so much money as Emotes,” he said on Twitter in July. “Black creatives created and popularized these dances but never monetized them. Imagine the money people are spending on these Emotes being shared with the artists that made them.”

Back in March, Faison noticed his likeness in the game, too, saying on Twitter, “Dear fortnite ... I’m flattered? Though part of me thinks I should talk to a lawyer ...”

Webb, who ran like a cartoon character to the beat of A-ha’s “Take on Me” in the “Band of the Bold” video, wasn’t pleased, either: “They stole my move and basically didn’t give me any credit for it,” he said in a March video called “Fortnite Stole From Me.”

“The problem is players could be thinking, ‘Maybe the artists endorsed this. Maybe Milly endorsed this,’ ” Hecht said. “That’s just not the case. Because these moves are for sale, that has made it much worse.”

The legal argument in 2 Milly’s case centers on copyright infringement and the right of publicity, in which 2 Milly claims Epic Games essentially hijacked a piece of his identity and likeness. But the case, though premised on traditional arguments, may be venturing into a whole new legal territory.

Case law on copyright cases for choreographed works is notoriously thin and murky in the first place, according to a 2018 Fordham Intellectual Property, Media and Entertainment Law Journal article. (Hecht says he is certain the “Milly Rock” qualifies as copyrighted choreography, though he would not elaborate.)

But here's where things get more interesting: The case centers on avatars allegedly copying a human's dance moves in digital format — a 21st-century problem for a 20th-century law.

2 Milly's lawyers have accused Epic Games of literally stealing the dance moves frame-for-frame from the rapper's music video, by coding the still frames and applying it to the avatars. Hecht compared the alleged method to tracing a picture. "These are rendered in such a way that this isn't just an imitation," Hecht said. "This is a deliberate copy."

Hecht argues this amounts to not just stealing dance moves, but also stealing a piece of 2 Milly's identity — regardless of whether the dance is copyrighted. Hecht said a relevant example involves, surprisingly, Bette Midler in the 1980s. After Ford Motor Co. and its ad agency hired a Midler impersonator to sing her song in an advertisement, Midler claimed the auto magnate appropriated her identity through impersonation. She ultimately won in the U.S. Court of Appeals for the 9th Circuit, a ruling that was upheld by the Supreme Court in 1992, even though she didn't need to copyright the sound of her voice.

2 Milly has said in an interview with Kotaku that he would have worked alongside Epic Games if the company had reached out and expressed interest in using the "Milly Rock" with full credit in the game. "I don't feel it's appropriate that my art (dance) which is a big part of culture is basically stolen," he said.

He said he would have liked a contract and some sort of compensation. In November, however, as he announced his intention to sue, he stressed that it wasn't just about money.

"I don't even want to bash them for all the millions," 2 Milly told CBS News. "Know what I mean? It's not really like that. I just feel like I have to protect what's mine."